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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 748.

THORNTON A. JENKINS,

Petitioner,

v.

THE STATE OF DELAWARE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinions of the Supreme Court of the State of Delaware (A 52 and A 98) are reported at 230 A. 2d 262 and 240 A. 2d 146.

JURISDICTION.

The final judgment of the Supreme Court of the State of Delaware was dated March 12, 1968 and was entered on March 14, 1968 (A 103). The Petition for a Writ of Certiorari was filed on May 3, 1968, and was granted on November 18, 1968. The jurisdiction of this Court rests upon 28 U. S. C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED.

The constitutional provisions involved are the Fourth Amendment, Fifth Amendment, Sixth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States, which are set forth in Appendix A.

QUESTIONS PRESENTED.

I. Whether *Johnson v. New Jersey*, 384 U. S. 719 (1966) required that the retrial of a defendant commenced after June 13, 1966 be conducted in conformity with the standards specified in *Miranda v. Arizona*, 384 U. S. 436 (1966).

II. Whether a warrantless search of a suspect's residence based solely upon the consent of a joint occupant is barred by the Fourth and Fourteenth Amendments, where the suspect was in custody and immediately available to give or withhold his consent and where the specific purpose of the search was to obtain evidence to be used against him.

STATEMENT OF THE CASE.

The Petitioner and his common-law wife,[1] Leona Marshall, had lived together for approximately four years prior to the Petitioner's arrest on March 17, 1965 (A 82). Some two or three years before the Petitioner's arrest, they had rented a dwelling at 617 East Fifth Street in Wilmington, Delaware (A 39, 81). The owner of the property carried Miss Marshall's name as the tenant to whom the property was rented (A 42). However, except for monies received from a roomer, the initial rental deposit and monthly rental charges were all paid for by the Petitioner (A 85).

On the morning of March 17, 1965, officers of the Wilmington Police Department discovered the victim of an apparent homicide in a junkyard (A 46). The Petitioner and a companion had been seen and apprehended by police officers at a point in the vicinity of the junkyard on the evening of March 16, 1965 (Tr. A 17-21; Tr. B 41-43).[2] Following discovery of the victim's body, police officers went to the Petitioner's East Fifth Street residence for the purpose of apprehending the Petitioner and his companion of the prior evening (A 13-15, 74).

Five police officers arrived at the Petitioner's residence at approximately 9:45 A. M. (A 74, 78). Sergeant Mackey went to the rear of the dwelling and apprehended the Petitioner in the rear yard (A 17, Tr. B 58). Sergeant Maloney knocked on the front door and was admitted by Leona Marshall (A 16, 74), who was dressed in a housecoat, or similar garment (A 18, 76). Sergeant Maloney asked for the Petitioner (A 16, 74). The persons in the house

1. The term "common-law wife" is not used in the technical sense. Common-law marriages are not recognized in Delaware. *Owens v. Bentley*, 1 Terry (40 Del.) 512, 14 A. 2d 391 (Super. Ct. 1940).

2. As used herein, Tr. A. designates references to the record of Petitioner's first trial and Tr. B to the record of Petitioner's second trial.

and the Petitioner were collected in the dining room, where she observed the Petitioner and another man being directed by the police to lean against the wall (A 83). Leona Marshall was told by Sergeant Maloney to get dressed (A 30, 83), and that they were "all going downtown" (A 30, 83). No search was made of the house at that time (A 16).

The Petitioner, Miss Marshall and the other persons in the house were taken into custody and removed to the Detective Division of police headquarters (A 20, 78). Miss Marshall was seated on a bench immediately outside the Detective Division and the Petitioner was placed in a separate "recording room" (A 21, 78-79).

Shortly after arriving at the Detective Division, Miss Marshall was taken into the main area of the Detective Division, where Sergeant Maloney talked to her (A 21). At the time, the Petitioner was still situated in the recording room, which was in the same confine as the main area of the Detective Division (A 78). Although he was aware of the fact that the Petitioner and Miss Marshall lived together at the East Fifth Street house as common-law man and wife, Sergeant Maloney never did ask the Petitioner for his permission to search the house (A 25, 79-80).

At approximately 11:40 a.m. on the morning of March 17, 1965, Sergeant Maloney advised Miss Marshall that the police were investigating a burglary and a murder[3] (A 21, 25, 79) and asked for permission to search the property (A 21, 31-32, 79). Miss Marshall said "yes" (A 28). The evidence is conflicting upon whether nor not Miss Marshall was told that she did not have to permit the police to search the house (A 21, 31-32, 79, 83-85).[4] For her part, Miss

3. Miss Marshall testified that this advice was not given until later (83-84).

4. "I advised her of her rights and requested permission to search the house. This permission was granted" (A 15). "I once again explained to her in the presence of Sergeant Gregg that it wasn't necessary for her, if she didn't desire to, to let us search the house" (A 15).

Marshall testified that she "didn't know exactly what to do" when her permission to search the property was sought (A 83) and that as far as she was concerned, she had no choice but to consent (A 32, 84). As Miss Marshall phrased it, although she was apparently not frightened by the situation (A 35), ". . . . they still hadn't told us what it was all about, so I just told them to go ahead in and search it" (A 83).

In the meantime, the Petitioner remained in police custody in the recording room of the Detective Division. At 11:00 a.m. on the morning of March 17th, he was formally charged with night prowling, and at 1:15 p.m. he was formally charged with burglary in the fourth degree and murder in the first degree (A 49, 96). But even prior to the time when the police apprehended the Petitioner at his home, it was clear to them that they were investigating a homicide and that the Petitioner was "considered a prime suspect" (A 13-14, 25, 79-80).

Pursuant to the permission obtained from Miss Marshall, Sergeant Maloney and Sergeant Gregg searched the Petitioner's East Fifth Street house (A 15). They seized a number of items of junk from the basement, and a jacket allegedly belonging to the Petitioner was taken from the bedroom which he and Miss Marshall occupied (A 15). The junk was identified as having come from the junkyard where the homicide victim was discovered (Tr. B 52-53). The jacket, which was stained with human blood of the same type as the homicide victim (Tr. B 154), was admitted into evidence together with the other items seized from the cellar of the house (Tr. B 133, 158).

The Petitioner was interrogated three times on March 17, 1965, by Detective Sergeant John Ogden—11:30 a.m., 2:50 p.m., and 7:05 p.m. At no time was the Petitioner advised by Sergeant Ogden of his right to have counsel

supplied him if he was unable to afford counsel of his own choice (A 46, 47-48, 91). At 7:15 p.m. Sergeant Ogden obtained an incriminating statement from the Petitioner (A 90), which was later admitted into evidence (Tr. B 147).

The Petitioner was indicted by the Grand Jury on June 8, 1965 (A 1, dkt. entry A 1), the indictment charging him and a co-defendant with murder in the first degree, as well as other offenses (A 5-8). The Petitioner filed timely motions to suppress the evidence comprised of the product of the search of his residence on March 17, 1965 (A 9-10) and the statement obtained from him that same day (A 11-12. Both motions were denied at the beginning of Petitioner's trial (A 61, 65).

The Petitioner's first trial began on January 13, 1966 and resulted in his conviction of burglary in the fourth degree and murder in the first degree (A 1, dkt. entry 36). The Petitioner's conviction of murder in the first degree was reversed by the Delaware Supreme Court upon several grounds: the insufficiency of the evidence to establish the express malice requisite to first degree murder (A 53-56); improper jury instruction in regard to the applicable felony-murder rule (A 56-60) and error in compelling the Petitioner to be tried jointly with his co-defendant (A 55-58). The Delaware Supreme Court upheld the search as proper (A 61-64) and sua sponte determined that *Johnson v. New Jersey*, 384 U. S. 719 (1966) did not require the application of the standards prescribed by *Miranda v. Arizona*, 384 U. S. 436 (1966) to any retrial of the Petitioner (A 69-70), to which position it adhered following the grant of Petitioner's application for reargument (A 72-73).

The Petitioner's second trial began on October 2, 1967 and resulted in his being convicted of murder in the second degree (Tr. B 3, 225). Upon appeal to the Delaware Supreme Court, the conviction was affirmed (A 90-102).

SUMMARY OF ARGUMENT.

There are two interpretations of the Court's intention in formulating the language of *Johnson v. New Jersey*, 384 U. S. 719 (1966). One interpretation of the Court's intention in *Johnson* is that this Court did not consider the question of applicability of *Miranda* to retrials. The second interpretation of the Court's intention is that this Court did provide guidance on this question in its opinion in the *Johnson* case *supra*. Under either interpretation, logic dictates that *Miranda* should not apply to a retrial when its safeguards were not applicable to the original trial. In *Stovall v. Denno*, 388 U. S. 293 (1967) this Court made clear that the *Wade* and *Gilbert* safeguards would not apply to retrials.

Additionally, applying *Miranda* to retrials would serve to punish the police and society in the same way that *ex post facto* legislation would punish an individual for committing an act that was not a crime at the time he acted. (Argument I).

A mistress who has sufficient control over the premises on which certain incriminating evidence was located may consent to a search of those premises. Items seized during this lawful and reasonable search are admissible against anyone who can be related to those premises. (Argument II).

ARGUMENT.

I. The Safeguards of *Miranda v. Arizona*, 384 U. S. 436, Do Not Apply to Retrials Commencing After June 13, 1966, When the Retrial Is of a Case Which Was Tried Prior to June 13, 1966.

Petitioner asks this Court to rule that the *Miranda* safeguards do apply to retrials commencing after June 13, 1966, notwithstanding the fact that the trial in which the retrial was granted was commenced and completed prior to June 13, 1966. Some general principles concerning the retroactiveness of the *Miranda* safeguards were set forth by this Court in the case of *Johnson v. New Jersey*.[5]

Any discussion concerning the applicability of *Miranda*, must involve two separate and distinct interpretations of this Court's intentions in the Johnson case.

The first interpretation is that this Court did *not* consider the question of applicability of *Miranda* safeguards to retrials in the *Johnson* decision. The second interpretation is that this Court did consider the question of applicability of *Miranda* safeguards to retrials in the *Johnson* decision and has offered the answer to this question in the language of the *Johnson* decision. Respondent proposes to discuss this question from both viewpoints.

First, Respondent assumes that this Court did not consider the precise question in the *Johnson* case. There is an indication that this assumption is correct in the language of *Stovall v. Denno*.[6] In Stovall, this Court held that *United*

5. 384 U. S. 719.

6. 388 U. S. 293 (1967).

States v. Wade,[7] and *Gilbert v. California,*[8] require the exclusion of *identification evidence,* which is tainted by exhibiting the accused to identifying witnesses before trial in the absence of counsel. The principles of these decisions "affect only those cases and all future cases which involved confrontations for identification purposes conducted in the absence of counsel *after this date.*"[9]

Thus, in *Stovall,* this Court held the date of confrontations to be critical, as opposed to *Johnson,* where this Court held the date of trial to be critical. Chronologically the *Stovall* decision was handed down subsequent to the *Johnson* decision. It is thus logical to assume that this Court realized that it had not considered the question of applicability to retrials in the confession cases and wanted to insure that this question was covered in the lineup cases.

Respondent would like to draw an analogy to the lineup cases and point to the *Stovall* case as its main authority for the proposition that the *Miranda* safeguards should not apply to retrials as long as the original trial was commenced and completed prior to June 13, 1966. Logic dictates that identical rules should apply to both lineups and confessions.

Secondly, Respondent would like to examine this question assuming that this Court did consider the question of applicability of *Miranda* safeguards to retrials in the *Johnson* case. The majority of the State and Federal jursidictions which have considered this question have assumed that this Court had considered the question of applicability to retrials at the time it formulated the *Johnson* decision. To

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7. 388 U. S. 218 (1967).

8. 388 U. S. 263 (1967).

9. 388 U. S. at 296. (Emphasis supplied.)

date, seven State Courts have ruled and determined that *Miranda* is not applicable to retrials.[10]

Nine States have concluded that *Miranda* is applicable to retrials.[11]

The Federal Courts in five different circuits have likewise discussed the question.[12]

10.

ILLINOIS: *People v. Worley*, 37 Ill. 2d 439, 227 N. E. 2d 746 (1967).
MARYLAND: *Boone v. State*, 237 A. 2d 787 (Md., 1968).
NEW JERSEY: *State v. Vigliano*, 50 N. J. 51, 232 A. 2d 129 (1967).
NEW YORK: *People v. Sayers*, 22 N. Y. 2d 571, 240 N. E. 2d 540 (1968).
NORTH CAROLINA: *State v. Branch*, 11 N. C. App. 279, 161 S. E. 2d 492 (1968) and *State v. Lewis*, 11 N. C. App. 296, 161 S. E. 2d 497 (1968).
TENNESSEE: *Patten v. State*, 426 S. W. 2d 503 (Tenn., 1968).
DELAWARE: *Jenkins v. State*, 230 A. 2d 262 (Sup. Ct., 1967).

11.

ALABAMA: *Smith v. State*, 210 So. 2d 826 (Ala., 1968).
ARIZONA: *State v. Brock*, 101 Ariz. 168, 416 P. 2d 601 (1966).
CALIFORNIA: *People v. Doherty*, 59 Cal. Rptr. 857, 429 P. 2d 177 (1967).
HAWAII: *State v. Ruiz*, 49 Haw. 504, 421 P. 2d 305 (1966).
INDIANA: *Dell v. State*, 231 N. E. 2d 522 (Ind., 1967).
KANSAS: *State v. McCarther*, 197 Kan. 279, 416 P. 2d 290 (1966).
KENTUCKY: *Creech v. Commonwealth*, 412 S. W. 2d 245 (Ky., 1967).
RHODE ISLAND: *State v. Bradshaw*, 221 A. 2d 815 (R. I., 1966).
WISCONSIN: *State v. Shoffner*, 31 Wis. 2d 412, 143 N. W. 2d 458 (1967).

12.

THIRD CIRCUIT: *United States v. Pinto*, 259 F. Supp. 729 (D. C. N. J., 1966), aff'd per curiam 374 F. 2d 472 (3d Cir., 1967), rev'd on other grds., 389 U. S. 31 (1967); and *Virgin Islands v. Lovell*, 378 F. 2d 799 (3d Cir., 1960).
FOURTH CIRCUIT: *Moorer v. South Carolina*, 368 F. 2d 458 (4th Cir., 1968).
FIFTH CIRCUIT: *Gibson v. United States*, 363 F. 2d 146 (5th Cir., 1966).
SEVENTH CIRCUIT: *United States v. Phillips*, 401 F. 2d 301 (7th Cir., 1968).
NINTH CIRCUIT: *Amsler v. United States*, 381 F. 2d 37 (9th Cir., 1967) and *United States v. Young*, 388 F. 2d 675 (9th Cir., 1968).

Most of the State cases supporting Petitioner's viewpoint that *Miranda* is applicable to retrials have so determined on the definition of the word "trial" as set forth in the *Johnson* case. These courts have ruled that the term "retrial" is subsumed in the term "trial". The courts in two of those states have relied upon State statutes as support for ruling *Miranda* to be applicable to retrials.[13]

There is much additional language in the *Johnson* case which must be scrutinized and examined in an effort to obtain the court's message. This Court states at one portion of the *Johnson* opinion,

> "Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test."[14]

It certainly cannot be said that Petitioner, Thornton Jenkins, who had been arrested and in custody since March 17, 1965, on this charge is a future defendant. The Petitioner in this case has been a defendant for over one year prior to *Miranda*. Properly he should be designated a past defendant and not a future defendant.

A close reading of the *Johnson* decision indicates other language which supports the classification of a defendant in a retrial as a past defendant. That language states:

> "Escobedo and Miranda should apply only to cases commenced after those decisions were announced."[15]

13.
ARIZONA: *State v. Brock*, 101 Ariz. 168, 416 P. 2d 601 (1966).
CALIFORNIA: *People v. Doherty*, 59 Cal. Rptr. 857, 429 P. 2d 177 (1967).

14. 384 U. S. at 732.

15. 384 U. S. at 733.

The term "case" usually means the complete history of the judicial proceedings against a defendant when a claim or contention of one party takes such a form that the judicial power is capable of acting upon it.[16] The Supreme Court of New Jersey has pointed out and interpreted "cases commenced" to refer to cases in which the first judicial step was taken after *Miranda*.[17]

The Supreme Court of New Jersey stated that its view

> "accords with a commonplace of the criminal law in this country, i.e., an order for a new trial as an incident of a reversal of a conviction on appeal simply amounts to a continuance of the same case looking toward a final judgment of either acquittal or conviction."[18]

Thus, there are three phrases in *Johnson* in addition to "trial". Those words are "future defendants", "past defendants" and "cases commenced". These phrases all shed light on this Court's meaning of the word "trial". These indicate that this Court did not intend the word "retrial" to be subsumed in the word "trial."

Throughout the *Johnson* opinion, a reader discerns the concern of this Court for police reliance and the potential burden on the administration of justice. This Court felt that although some past or pending cases might be tainted by improperly obtained confessions, the discrimination against those defendants would be outweighed by "the exigencies of the situation."[19]

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16. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125 (1894).

17. *State v. Vigliano*, 50 N. J. 51, 232 A. 2d 129 (1967).

18. *Id.*

19. 384 U. S. at 727, 728-29.

The reliance of law enforcement officials on certain standards prior to *Escobedo* and *Miranda* is discussed in the following language from the *Johnson* decision:

> "Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*. This is in favorable comparison to the situation before *Mapp v. Ohio*, . . ., where the States at least knew that they were constitutionally forbidden from engaging in unreasonable searches and seizures under *Wolf v. Colorado* . . .[20]
>
> ". . . Law enforcement officers and trial courts will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore of the specific safeguards which are now obligatory. Consequently they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege."[21]

In a situation such as the present appeal, the police should not be punished or penalized for relying on the law previously announced at the time of interrogation. The State of Delaware should not be disadvantaged because Petitioner's appeal to the State Supreme Court resulted in a reversal and remand for a new trial. This Petitioner should not be given a favorable position over a defendant who was arrested at the same time and who confessed at the same time, but whose conviction was upheld.

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20. 384 U. S. at 731.
21. 384 U. S. at 732.

It is axiomatic that the administration of justice must achieve a balance between the interest of society and protection of a defendant's constitutional rights. Therefore, some discussion about the interest of society is warranted.

In many retrial situations where *Miranda* safeguards are held applicable, the result will be a dismissal of prosecution by the State. Since a retrial would not occur until two or three years after the incident, the police would have a very difficult task in gathering additional evidence to compensate for the inadmissibility of the confession. This situation is far different from the normal case where the police, with knowledge of the constitutional safeguards set forth in *Miranda* have the opportunity to gather the evidence necessary for prosecution. However, in the retrial situation, the police justifiably have relied upon the admissibility tests that were the law at the time of the confession and may have not taken the opportunity to gather fresh evidence. Thus, a ruling that *Miranda* is applicable to retrial could tend to push the scales of justice out of balance and away from society's interest.

Whenever and wherever possible, the administration of justice should not culminate in an illogical result. "Illogical" is the only description which can be placed on a situation where the police and the prosecution are barred from presenting evidence at a retrial when that evidence was legally and constitutionally admissible at the original trial.

One purpose of the *Miranda* decision was to set certain standards in police conduct. *Miranda* made explicit what conduct is required of the police in seeking a confession. Applying *ex post facto* safeguards to a retrial would in no way serve the purpose of instructing the police what conduct is required in the taking of a confession. The

police and society should not be punished for not adhering to rules which were not in existence at the time that they acted. The administration of justice requires this Court to rule that the *Miranda* safeguards are not applicable to retrials, when the original trial was commenced and terminated prior to June 13, 1966.

II. The Search of Petitioner's Girlfriend's Home Pursuant to the Consent of Petitioner's Girlfriend Is a Proper Search.

On page 25 of Petitioner's brief, Petitioner contends that the tenant's consent to search her home was not voluntarily given. On this point, Petitioner contends that the police did not go far enough in advising her what constituted probable cause in obtaining a search warrant. This contention can be readily answered by pointing to the testimony of Sgt. Maloney, appearing at page 75 of the joint appendix.[22] These statements by the tenant show voluntariness. The Petitioner passes this point quickly in his brief and gets to what he considers the main point, namely whether Miss Marshall can effectively waive the rights of the Petitioner. There is a vast amount of Federal and State authority which has upheld the constitutionality of searches and seizures where the consenting person posssesses sufficient control of the premises.[23]

As the Delaware Supreme Court stated in its opinion:[24]

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22. After I requested this I also informed her that we were investigating a complaint of murder. She stated that she had nothing to hide, that I could search her house as she knew I could get a search warrant if I wanted to.

23. Annotation 31 A. L. R. 2d 1078; Third party consent to search and seizure, 33 University of Chicago Law Review 797, 801 (1966).

24. *State v. Jenkins*, 230 A. 2d 262, 269-271 (1967).

"'Sufficient control' is more frequently predicated upon a joint and equal possession and control of the premises searched."[25]

The Delaware Supreme Court goes on to explain the sufficient control theory as follows:[26]

"The line of reasoning which underlines the joint control doctrine may be stated as follows: the consenting person has the authority, acting in his own behalf and not as agent for the nonconsenter, to permit a search of premises to which he has immediate right of possession and control; a search pursuant to such consent is reasonable, absent other circumstances tending to make it unreasonable; evidence that is the product of a reasonable search may be used against anyone."

Considering the case at hand, it is clear that the status of Miss Marshall, when viewed most favorably for Peti-

25. The cases often involve spousal relationships, but are not limited thereto. For cases upholding a wife's consent as against her husband, see e.g., *State v. Cairo*, 74 R. I. 377, 60 A. 2d 841 (1948); *People v. Harvey*, 48 Ill. App. 2d 261, 199 N. E. 2d 236 (1964); *Bellam v. State*, 233 Md. 368, 196 A. 2d 891 (1964); *People v. Carter*, 48 Cal. 2d 737, 312 P. 2d 655 (1967); *United States v. Heine* (2 Cir., 1945), 149 F. 2d 485; *United States v. Sergio* (E. D. N. Y., 1937), 21 F. Supp. 553. It has been recognized that it is not the marital status, but rather the joint control and possession of the couple's premises that establishes the wife's authority to give an effective consent. See *Roberts v. United States* (8 Cir., 1964), 332 F. 2d 892; *State v. Hall*, 264 N. C. 559, 142 S. E. 2d 177 (1965); *People v. Perroni*, 14 Ill. 2d 581, 153 N. E. 2d 578 (1958). For cases not involving spousal relationships, but nonetheless upholding third person consent on the basis of joint control, see e.g., *United States v. Sferas* (7 Cir., 1954), 210 F. 2d 69 (partner of defendant); *Nestor v. State*, 243 Md. 438, 221 A. 2d 364 (1966) (co-tenant with defendant); *People v. Howard*, 166 Cal. App. 2d 638, 334 P. 2d 105, 106 (1958) (mistress of defendant); *People v. Silva*, 140 Cal. App. 2d 791, 295 P. 2d 942 (1956) (brother of defendant's mistress who lived on the premises).

26. *Id.* at 270.

tioner, is that of a joint occupant with Petitioner. It is further clear that Miss Marshall, as the sole legal tenant, had the superior right of possession and control of the premises as between Petitioner and herself. Because of her sufficient control, she is able to give her consent to the search of the premises. Because of her consent, the ensuing search was reasonable, and the fruits of that search are admissible against *Jenkins*.

Petitioner relies heavily in his brief at pages 27 through 29 on the case of *Stoner v. California*, 376 U. S. 483, 84 S. Ct. 889 (1964). Respondent notes the fact that this Court emphasized the personal nature of the right against unreasonable searches and seizures in *Stoner, supra*. However, there is a vast difference between the facts of *Stoner* and the facts in the case at hand. In *Stoner*, it was a hotel desk clerk who consented to the search of a hotel guest's room. The hotel clerk's right to possession and control of that room was inferior to the right of possession and control of the hotel guest. In this case, the right of Miss Marshall to possession and control of this house in which she was the legal tenant is greater than the right of Petitioner Jenkins to possession and control of this house.

It is interesting to note that the United States Court of Appeals for the Fifth Circuit in a most recent opinion, (not yet reported), discussed the question of who may consent to a search in the case of *Gurlewski v. United States*.[27] The Fifth Circuit emphasized that a wife has one advantage over a mere mistress. Only a wife, and not a mistress, is *incapable* of validly waiving her husband's objection to a warrantless search. On the other hand, a mistress is nothing more than a friend who may waive any objection her paramour may have to a search.

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27. CrL 2258 *Gerler v. United States*, C. A. 5, 11-27-1968.

In summary, it is clear that Miss Marshall had sufficient possession and control of the premises searched to give her consent for a search of those premises. It is further clear that she was not coerced into giving her consent, but consented freely and voluntarily. Thus, the search of Leona Marshall's home was reasonable and lawful. The fruits of this reasonable and lawful search are admissible into evidence against Petitioner Jenkins.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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